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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY WAYNE LOUIS, Defendant and Appellant.	E069867 (Super. Ct. No. INF1701048) OPINION

APPEAL from the Superior Court of Riverside County. Otis Sterling III, Judge. Affirmed.

Richard L. Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A radiology business with an office in Palm Springs used an automated system to make phone calls and send text messages to its patients. In attempting to enter one

patient's phone number into the system, someone transposed two digits and entered the phone number of defendant Jerry Wayne Louis instead. Defendant therefore began receiving repeated "robocalls."

On August 16, 2016, defendant called the Palm Springs office. Employee Brittany R. answered the phone. He told her, "If you keep calling me, . . . I'm going to shoot you and the Palm Springs office up."

Brittany R. — who was crying — reported the call to her supervisor, in Indio. The supervisor called defendant back, "to try to calm the situation." Defendant said, "Goddamn it, didn't you hear what I said? I just told the other person . . . now I'm going to come down there and shoot the place up." The supervisor "believe[d] th[e] threat." She "felt frantic." She called a higher-up, who decided to shut down the Palm Springs office.

Based on the threat to Brittany R.,[1] defendant was charged with one count of making a criminal threat. (Pen. Code, § 422.) In his first trial, the jury hung, but in his second trial, the jury found him guilty. The trial court reduced the conviction to a misdemeanor (Pen. Code, § 17, subd. (b)) and sentenced defendant to time served (four days).

In this appeal, defendant challenges a jury instruction that a criminal threat need not be "absolutely" unconditional, as long as it is "so unequivocal, unconditional,

1 The prosecutor explained to the jury that the threat to the manager was not charged as a crime because the manager was in Indio at the time.

immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution." We will hold that, based on controlling California Supreme Court authority, this instruction was legally correct. Accordingly, we will affirm.

I

THE SPECIAL INSTRUCTION REGARDING A CRIMINAL THREAT

A. *Additional Factual and Procedural Background*.

Before trial, the People requested a special instruction stating: "The threat is not required to be unconditional. It may be conditional, depending on the context."

The trial court held an off-the-record instructions conference.

It gave the standard instruction on the elements of the crime, as follows:

"The defendant is charged in Count 1 with having made a criminal threat in violation of Penal Code section 422.

"To prove that the defendant is guilty of this crime, the People must prove that:

"Number 1, the defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Brittany R.;

"2, the defendant made the threat orally;

"3, the defendant intended that his statement be understood as a threat and intended that it be communicated to Britany R.;

"4, the threat was so clear, immediate, unconditional, and specific that it communicated to Brittany R. a serious intention and immediate prospect that the threat would be carried out;

"5, the threat actually caused Brittany R. to be in sustained fear for her own safety or for the safety of her immediate family;

"and

"6, Brittany R.'s fear was reasonable under the circumstances. [¶] … [¶]

"In . . . deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves as well as the surrounding circumstances." (CALCRIM No. 1300.)

The trial court also gave the following special instruction:

"It is not required that a criminal threat under Penal Code section 422, be absolutely unequivocal, unconditional, immediate, and specific. Only that it be so unequivocal, unconditional, immediate and specific as to convey to the victim a gravity of purpose and immediate prospect of execution.

"Accordingly, a criminal threat may be conditional, depending on the context and surrounding circumstances.

"Before you can convict the defendant of a criminal threat, you must be convinced beyond a reasonable doubt that the evidence supports each of the elements of the offense. If the People have not met this burden, you must find the defendant not guilty of a criminal threat."[2]

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[2] The record does not indicate how the wording of the special instruction, as initially requested by the People, came to be changed to the wording as actually given.

B. *Discussion.*

Preliminarily, the People contend that defendant forfeited his present contention by failing to object to the special instruction below.

"Although defendant failed to lodge an objection to this instruction, he may nevertheless raise a claim that it affected his substantial rights. [Citations.]" (*People v. Powell* (2018) 6 Cal.5th 136, 168, fn. omitted; see also Pen. Code, § 1259.) And "'whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim . . . .' [Citation.]" (*People v. Ngo* (2014) 225 Cal.App.4th 126, 149.)[3] Thus, a claim that an instructional error violated the defendant's substantial rights is never forfeited by failure to object — even if, in the end, the appellate court finds no such error. (E.g., *People v. Covarrubias* (2016) 1 Cal.5th 838, 904-905.)

We therefore turn to the merits of the contention.

The trial court must give a requested jury instruction on the law, provided it is "correct and pertinent." (Pen. Code, § 1127; see also *id.*, § 1093, subd. (f).) "We independently review the legal correctness of an instruction. [Citation.]" (*People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

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[3] It is not clear why the People are even bothering to argue forfeiture, as they concede that we must reach the merits of the claim, if only to determine whether it was forfeited.

One of the elements of the crime of making a criminal threat is that the threat must be "on its face and under the circumstances in which it is made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat . . . ." (Pen. Code, § 422, subd. (a).)

People v. Bolin (1998) 18 Cal.4th 297 (*Bolin*) is controlling here. In *Bolin*, the defendant sent a letter to the father of his daughter's child (see *id.* at p. 311) saying:

1. "'If you ever[] touch my daughter again, I'll have you *permanently* removed from the face of this Earth.'" (*Bolin*, *supra*, 18 Cal.4th at p. 336, fn. 11.)

2. "'I'm still going to find out how much you got for the Buick and if it's 1¢ over 1000 you can kiss your ass good by[e].'" (*Bolin*, *supra*, 18 Cal.4th at p. 336, fn. 11.)

3. "'Everything that's mine or hers . . . , you better give it to Paula. . . . You have a week to do it or I make another phone call.'" (*Bolin*, *supra*, 18 Cal.4th at p. 336, fn. 11.)

After the defendant was convicted on two counts of murder (*Bolin*, *supra*, 18 Cal.4th at p. 309), the People introduced the letter as evidence in aggravation in the penalty phase of trial. (*Id.* at pp. 336-337.)

On appeal, the defendant argued "that because the letter did not contain an unconditional threat, it did not constitute a violation of [Penal Code] section 422 as a matter of law and was therefore inadmissible as evidence of prior unadjudicated criminal activity." (*Bolin*, *supra*, 18 Cal.4th at p. 337; see also Pen. Code, § 190.3 & *id.*, subd. (b)

[in penalty phase, the People may introduce evidence of "other criminal activity by the defendant . . . which involved the express or implied threat to use force or violence . . . ."].)

The Supreme Court stated: "We . . . now hold that prosecution under [Penal Code] section 422 does not require an unconditional threat of death or great bodily injury." (*Bolin, supra,* 18 Cal.4th at p. 338.)

The court reviewed the history of Penal Code section 422 (*Bolin, supra,* 18 Cal.4th at pp. 338-339) and concluded that "the reference to an 'unconditional' threat in section 422 is not absolute." (*Bolin,* at p. 339.) The "'use of the word "unconditional" was not meant to prohibit prosecution of all threats involving an "if" clause, but only to prohibit prosecution based on threats whose conditions precluded them from conveying a gravity of purpose and imminent prospect of execution.' [Citations.]" (*Ibid.*)

"Moreover, imposing an 'unconditional' requirement ignores the statutory qualification that the threat must be '*so* . . . unconditional . . . *as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution* . . . .' [Citation.] 'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*Bolin, supra,* 18 Cal.4th at pp. 339-340.)

Finally, the court specifically disapproved *People v. Brown* (1993) 20 Cal.App.4th 1251, which had held that, as a matter of law, a conditional threat could not violate Penal Code section 422. (*Bolin*, *supra*, 18 Cal.4th at p. 338, fn. 12.)

Defendant labels this discussion in *Bolin* "dicta." Hardly. "'Dictum is the "statement of a principle not necessary to the decision."' [Citation.]" (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 287.) In *Bolin*, the court had to decide whether Penal Code section 422 required an absolutely unconditional threat, because if it did not, the defendant's letter containing seemingly conditional threats would not have been admissible in aggravation under Penal Code section 190.3. (See generally *People v. Lancaster* (2007) 41 Cal.4th 50, 92-94.) Thus, the Supreme Court itself labeled its discussion a "hold[ing]."

Admittedly, here the meaning of "unconditional," as used in Penal Code section 422, arises in the context of an asserted instructional error, rather than an asserted evidentiary error. Nevertheless, the fundamental issue is identical.

Defendant's threat was in conditional form. In light of this fact, the challenged instruction was both pertinent and correct. Defendant does not so much as claim there was insufficient evidence that his threat was unconditional *enough* to convey a gravity of purpose and an immediate prospect of execution. Hence, he has not shown any error.

II

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

RAPHAEL
J.